No. 15912

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CONTINENTAL TRADING, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING

FRED R. TANSILL,
Counsel for Petitioner,
824 Connecticut Ave., N. W.,
Washington 6, D. C.

Of Counsel:

GOODWIN, ROSENBAUM, MEACHAM & WHITE,
824 Connecticut Avenue, N. W.
Washington 6, D. C.

LEON, WEILL & MAHONY,
9 East 40th Street,
New York 16, New York.

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To The Honorable Pope, Denman and Orr, Circuit Judges of the United States Court of Appeals for the Ninth Circuit:

Under Rule 23, Continental Trading, Inc. respectfully petitions for a rehearing in connection with the Opinion filed by this court on March 10, 1959 affirming the decision of the Tax Court of the United States. Should this Court grant a rehearing it is suggested that the case be reheard *en banc* because of its importance.

Question Presented

Whether this Court should reconsider its Opinion and grant a Petition for Rehearing because of its failure to recognize the applicability of the Supreme Court's rule of "integration" of corporate activities as the proper test to be applied under Section 231(b) in determining whether a corporation is engaged in trade or business within the United States.

Statute Involved

Sec. 231. Tax on Foreign Corporations

(b) Resident Corporations.—A foreign corporation engaged in trade or business within the United States shall be taxable as provided in Section 14(c)(1) and Section 15.

Statement

The statement of facts appearing in this Court's opinion is adopted *pro tanto* for the purpose of this Petition. It must be added, however, that there are two other categories of facts (in addition to those specifically found by the Tax Court and adopted by this Court) which could become relevant.

The first category mainly involves facts which were not expressly found by the Tax Court but which were stipulated by the parties. The facts, as stipulated, were found by the Tax Court but were not published by it *in extenso.* This category also includes a few facts taken from uncontroverted testimony appearing in the Transcript. All of these facts in the first category are referred to specifically in footnotes "n" and "o" in Brief for the Petitioner on pp. 11-12, thereof. They concern the many and varied activities of the petitioner in the United States during the years in issue including: the continued presence of some

of its officers on American soil, frequent negotiations in this country by petitioner's president in an effort to establish recombined milk plants abroad, the constant drawing of checks in this country, the incurring of many office expenses, the collection of dividends, the sale of stock and the borrowing of money. This category is referred to only briefly herein.

The second category of facts relative to the present question consists of those which were not presented to the Tax Court, but which were referred to in an offer of proof made before the Tax Court in an oral argument relating to petitioner's Motion for Leave to File Motion to Vacate Decision, to Reopen the Proceedings and to Take Further Testimony. See R. 271-279. These facts include, *inter alia*, extensive negotiations in 1949 conducted by petitioner's officers in the United States to sell a Mexican race track and to sell two subsidiary corporations of petitioner, Bank Continental and Pan American Trust Company as well as negotiations in the United States culminating in the merger of the two telephone systems in Mexico City. These facts are not discussed further in connection with this Petition.

ARGUMENT

The Legal Test for Determining Whether a Foreign Corporation Is Engaged in a Trade or Business Within the United States Requires that Its Activities and Situation Be Judged as a Whole. Because the Opinion in this Case Has Failed to Apply this Test, Petition for Rehearing Should Be Allowed.

The petitioner respectfully represents that the opinion promulgated by this Court on March 10, 1959 fails to apply the proper legal test in resolving the issue of whether or not petitioner was a resident corporation in the United States, that is, whether it was engaged in trade or business

within the United States. Failure to enunciate and apply the proper legal test—consideration of the taxpayer's situation and activities in their entirety, as enunciated by the Supreme Court of the United States in *Edwards* v. *Chile Copper Co.* (1926) 270 U. S. 452,—is the defect complained of. It is submitted that if this test is applied to the uncontroverted facts, the conclusion inevitably would be reached that the petitioner was engaged in a trade or business within the United States during the taxable years. This legal test is, therefore, of controlling significance in this case. The application of the test by this Court under the rule of *stare decisis* should have required this Court to reverse the Tax Court below, not to affirm it.

Section 231(b) of the Internal Revenue Code of 1939 provides in effect that a foreign corporation "engaged in trade or business within the United States" shall be taxed as if it were a domestic corporation, although Section 231(c) limits its gross income, for purposes of the tax, to income from sources within the United States.

So far as petitioner can ascertain, none of the Circuit Courts of Appeal have previously construed this statute. Consequently, this seems to be a case of first impression at the appellate level, and for this reason the case has a significance beyond its own limits, in view of the large number of foreign corporations which have activities in the United States.

In its brief, counsel for petitioner showed that the Supreme Court of the United States had long ago enunciated the "rule of integration" in *Edwards* v. *Chile Copper Co.*, *supra,* in a case involving the question of whether a domestic corporation was "carrying on or doing business" under a Federal tax law. There it was held that the activities of a corporation (meaning within the United States) must be *integrated,* i.e., considered as a whole, in determin-

ing whether it was doing business, which is synonymous [1] with engaging in trade or business, in this country. Speaking through Mr. Justice Holmes, the Court said:

> "* * * we cannot let the fagot be destroyed by taking up each item of conduct separately and breaking the stick. The activities and situation must be judged as a whole."

This Court did not even refer to the *Chile Copper* case in its opinion [2] and it would seem that no attention was paid to it. The varied activities of petitioner are described on pages 23 and 24 of the Brief and show, within the language of the *Chile Copper* case, that petitioner in the United States "was doing what it was organized to do in order to realize profit." The fact that petitioner's negotiations for the erection of milk plants abroad produced no income is of no consequence so long as the negotiations took place. The petitioner completely satisfied the rule of the Court of Appeals for the Second Circuit announced in *Union In-*

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[1] See *Lewellyn* v. *Pittsburgh, B. & L. E. R. Co.* (CCA-3, 1915) 222 F. 177; G. C. M. 17014, XV-2 C. B. 317.

[2] The only cases cited by this Court in its opinion are: (1) *Higgins* v. *Com.*, 312 U. S. 212; (2) *Com.* v. *Smith* (CCA-2) 203 F. (2d) 310, and (3) *Linen Thread Co.* v. *Com.* (CCA-2) 128 F. (2d) 166. The first of these cases involved mere investment activities by an American citizen generated by him off American soil as a resident of Paris, France; the present case involves various kinds of activity generated by a corporation on American soil. The second case also is limited to individual investment activity. The third case was decided under an old statute and regulation which have been changed. Congress, in 1942, abolished the alternative test of "office or place of business" and retained the single test of "engaged in trade or business" for qualification as a resident foreign corporation. In any event, petitioner in the present case has shown a complex of varied activities going beyond the scope of mere "casual or incidental" transactions, although these latter, if any activities of petitioner can be properly characterized as such, must be considered as a stick among numerous sticks making up the fagot if the Supreme Court's rule is to be applied.

ternationale de Placements v. *Hoey* (CCA-2, 1938) 96 F. (2d) 591:

> "This appellant could come into the jurisdiction and be present here only by sending in to the jurisdiction or maintaining here its officers or other agents * * *."

The foregoing is precisely what the petitioner did.

This Court has cited the *Chile Copper* case with approval in a number of instances. In *Section Seven Corporation* v. *Anglim* (CCA-9, 1943) 136 F. (2d) 155, this Court, citing *Chile Copper,* observed:

> "No special volume of business is necessary to bring it [the corporation] within the taxing act—a very slight activity may be deemed sufficient to constitute 'doing business' ".

In *U. S.* v. *Western Shore Lumber Co.* (CCA-9, 1943) 136 F. (2d) 628, this Court cited *Chile Copper* for the statement:

> "The situation and activities must be considered in their entirety."

Again this Court cited the *Chile Copper* case in *Barker Bros. Corp.* v. *Rogan* (CCA-9, 1942) 126 F. (2d) 917. In that case this Court stated:

> "Hence borrowing from one of the subsidiaries is no different from borrowing from a bank and the aid in securing for the subsidiary company a lease of a store for its furniture business is nonetheless a business transaction, whether in so doing appellant be regarded as principal or agent. The fact that there was a single objective to be attained by these transactions carried on by the appellant and its two subordinate corporations would make it nonetheless an enterprise engaged in by each of the three."

In *U. S.* v. *Hercules Mining Co.* (CCA-9, 1941) 119 F. (2d) 288, this Court again cited the *Chile Copper Co.* case in the following context:

> "We do not rest our decision upon any particular activity of the corporation. *Perhaps each might be examined separately and separately discarded as not of a character so substantial as to be called business. But taxpayer's situation and activities must be judged in their entirety.*" (Emphasis supplied)

Significant for the purposes of the present discussion is the presence in the *Hercules Mining Co.* case of "other transactions or activities of a non-continuous nature." These do not appear to be conceptually different from the so-called "casual or incidental" transactions in the present case and yet they were included in the view this Court took of the "entirety."

This Court's opinion in the present case does not cite any of its own opinions just mentioned nor, as stated, does it cite the Supreme Court's opinion in *Edwards* v. *Chile Copper Co., supra.* Indeed, this Court has followed the fragmentation rather than the integration approach.

It first considers what it describes as the taxpayer's "investment" activities alone. It cites *Higgins* v. *Commissioner* (1941) 312 U. S. 212 for the proposition that mere management of investments and the collection of dividends is insufficient to constitute the carrying on of a trade or business. The activities of the present petitioner go far beyond mere investment activities, but under the rule of integration of the *Chile Copper* case, the investment activities must be considered along with all the other activities[3] in applying the required test of integration.

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[3] See *Comm.* v. *Nubar* (CCA-4, 1950) 185 F. (2d) 854, and *Adda* v. *Comm.* (CCA-4, 1948) 171 F. (2d) 457.

Next, this Court's opinion gives consideration to "some other activities of the petitioner." Following the pattern of the Tax Court below, these activities are described as "isolated and non-continuous" or "casual or incidental" transactions, although they were in reality very great in number and should hardly have been called "isolated and non-continuous." These activities, too, are considered separately, and standing alone they are held by this Court to be "not sufficient to show the corporation to be 'engaged in trade or business' ".

It is respectfully urged, therefore, that this Court's opinion in this case has *not* regarded petitioner's activities as an integrated whole in reaching its conclusion. It has examined the various activities of the corporation separately and has separately discarded them, to paraphrase this Court's own language in *U. S.* v. *Hercules Mining Co., supra.* This procedure specifically was disapproved in *Edwards* v. *Chile Copper Co., supra,* where the Supreme Court decried the destruction of the fagot by separately breaking each stick.

It is submitted that this Court should have concluded that the *combination* of petitioner's other activities with its investment activities constituted a sufficient *quantum* and *quality* of activity to require the conclusion of law that petitioner was engaged in a trade or business in the United States, under the rule and rationale of *Edwards* v. *Chile Copper Co.* and the related cases in this Circuit.

As a concomitant of its fragmentation approach, this Court's opinion holds that whether the "other activities of petitioner" should properly be regarded as "casual or incidental transactions" is a question of fact within the competence of the Tax Court. The opinion likewise holds that the problem of "whether as such, those transactions served

to change an otherwise 'non-trade or business' corporation into one within 231(b) is also a question of fact."

Petitioner has already shown why the first of these holdings does not conform to the rule of the *Chile Copper* case. Petitioner submits that the second of these holdings is in reality a question of law under the same decision to be applied to a totality of facts.

The mere recitation of the *entire list* of petitioner's activities during the taxable years would seem to require the conclusion that the fagot was sufficient to qualify the petitioner. Having in mind the factual patterns in the previously mentioned cases decided by this Court involving corporate business activity, both the *quantum,* and more important, the *quality* of petitioner's activities during the taxable years were significantly greater.

Petitioner here:

(a) Negotiated seven bank loans aggregating over $6,800,000

(b) repaid a considerable portion of these loans together with interest

(c) drew 199 checks on two bank accounts, which items aggregated in excess of $4,000,000.00

(d) purchased equipment in the United States as an accommodation for a foreign corporation

(e) purchased and resold a freight carload of fat

(f) purchased and resold 91 freight carloads of tin cans, three of which were sold to unrelated purchasers

(g) negotiated in the United States and abroad with respect to the petitioner's program for erecting recombined milk plants

(h) collected over $1,800,000.00 in dividends

(i) sold 55,000 shares of Servel stock

(j) borrowed sizable sums from its president and repaid them

(k) maintained a *de facto* office in Oakland, California

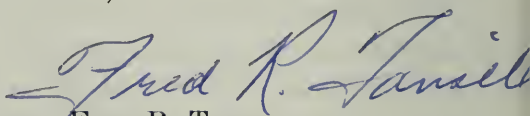
(l) maintained two of its officers in California who were active in the United States.

That all of these activities consumed the time, attention and interest of its officers is evidenced by the fact that a variety of significant office expenses were incurred including postage, insurance, telephone, telegraph, legal, printing, photostating and travel. Most important, the great bulk of all these activities described are taken from the agreed stipulation of facts in the Tax Court while the remaining few are taken from uncontroverted testimony in the record. While many of these facts were not even adverted to by the Tax Court, it is earnestly submitted that under the proper legal test petitioner's activities as a whole should have been considered, and that such consideration fairly requires the conclusion that petitioner was engaged in business in the United States.

Conclusion

This Court should grant this Petition for Rehearing and, in its discretion if it does so, order a rehearing *en banc*.

Respectfully submitted,



FRED R. TANSILL,
Counsel for Petitioner,
824 Connecticut Ave., N. W.,
Washington 6, D. C.

Of Counsel:

Goodwin, Rosenbaum, Meacham & White,
824 Connecticut Avenue, N. W.
Washington 6, D. C.

Leon, Weill & Mahony,
9 East 40th Street,
New York 16, New York

Certificate of Counsel

Fred R. Tansill, counsel for the petitioner in this Petition for Rehearing, hereby certifies that in his judgment the filing of this Petition for Rehearing is well founded and, further, certifies that this Petition is not interposed for delay.

Fred R. Tansill

Fred R. Tansill,
Counsel for Petitioner,
824 Connecticut Ave., N. W.,
Washington 6, D. C.

April, 1959.